No. 924 54

Supreme Court of the United States

THOMAS HAMMERSCHMIDT ET AL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit and Brief in Support Thereof.

ED. F. ALEXANDER,
JOSEPH W. SHARTS,
Attorneys for Petitioners.

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AUTHORITIES CITED.

Supreme Court of the United States

THOMAS HAMMERSCHMIDT, LOTTA BURKE, CHARLES THIEMANN, FRANK REIS, FRED SCHNEIDER, WILLIAM GRUBER, ALEXANDER J. FELDHAUS, JOSEPH GEIER, PHIL ROTHENBUSCH, ARTHUR TIEDTKE, JOHN HAHN and *ALFRED WELKER,*

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari.

To the Honorable Supreme Court of the United States:

Your petitioners, Thomas Hammerschmidt, Lotta Burke, Charles Thiemann, Frank Reis, Fred Schneider, William Gruber, Alexander J. Feldhaus, Joseph Geier, Phil. Rothenbusch, Arthur Tiedtke, John Hahn and Alfred Welker, respectfully represent to this Honorable Court:

(a) That at the October term, 1917, an indictment was presented by the grand jury of the Southern District of Ohio, Western Division, charging that these petitioners, and one Walter Gregory, now deceased, on or about

the 27th day of May, 1917, did conspire to defraud the United States (Rec. p. 5) "by impairing, obstructing and defeating a lawful function of the Government of the United States, to-wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the Act of Congress passed May 18, 1917, entitled 'An Act to authorize the President to Increase Temporarily the Military Establishment of the United States' and the lawful proclamations and regulations promulgated under the provisions of said Act, by printing, or having printed, and publishing, displaying and distributing or having published, displayed and distributed in various places and to various persons in said district, especially to male persons between the ages of twenty-one and thirty, both inclusive, hand bills, circulars, dodgers, and other literature, composed, printed, intended and designed for the purpose of counseling, advising, aiding and procuring said persons, especially said male persons between the ages of twenty-one and thirty, both inclusive, to evade and refuse to obey the requirements of said Act of Congress, by which said Act and the proclamations and regulations promulgated thereunder, said persons were required to present themselves for and submit to registration under the provisions of said Act and the proclamations and regulations promulgated thereunder."

Said indictment further charged the commission of certain overt acts to-wit, (1) the ordering of the printing of a certain circular set forth on page 7 of the printed record filed herewith, (2) the obtaining of 18,000 copies of said circular from the printer, and (3), (4), (5), the distributing of copies thereof to Susan Jeffries, Henry J. Dickhouse and William Steele respectively.

(b) Your petitioners moved to quash said indictment (Rec. pp. 9-11), demurred thereto (Rec. p. 25) and filed a plea in abatement (Rec. pp. 22-24). Said motion to quash and said demurrer set up (1) that said indictment did not set forth facts sufficient to constitute a conspiracy to defraud the United States of America or any offense against the United States; (2) that although said indictment charged a conspiracy to defraud the United States, it nowhere alleged any fraudulent acts on the part of the defendants or other facts indicating fraudulent acts or fraudulent intentions; (3) that said indictment did not set forth any overt acts on the part of defendants fraudulently done by defendants or done in pursuant of any conspiracy to defraud; (4) that said indictment was vague and indefinite and did not inform defendants of the nature and cause of the accusation.

Said motion, demurrer and plea were overruled. (Rec. p. 22, p. 26 and p. 25).

(c) Thereafter, your petitioners entered a plea of not guilty, were tried before Hon. Howard C. Hollister in said District Court of the Southern District of Ohio, Western Division, and on July 24, 1919, were found guilty by a jury with a recommendation of mercy. (Rec. p. 31).

(d) Thereafter, a motion for a new trial (Rec. p. 32). and a motion in arrest of judgment (Rec. p. 34), were filed by your petitioners and, said Hon. Howard C. Hollister having died after said trial without hearing said motions or entering judgment or sentence in said case, said motions were heard by his successor, Hon. John W. Peck, and were by him overruled (Rec., pp. 52, 53), and your petitioners were thereupon sentenced as follows (Rec., pp. 52 and 53):

Thomas Hammerschmidt, United States Penitentiary at Atlanta, Georgia, fifteen (15) months.

Lotta Burke, Missouri State Prison, at Jefferson City, Missouri, fifteen (15) months.

Joseph Geier, United States Penitentiary, Atlanta, Georgia, fifteen (15) months.

Charles Thiemann, United States Penitentiary at Atlanta, Georgia, one year and one day.

Frank Reis, United States Penitentiary at Atlanta, Georgia, one year and one day.

Fred Schneider, United States Penitentiary at Atlanta, Georgia, one year and one day.

William Gruber, United States Penitentiary at Atlanta, Georgia, one year and one day.

Alexander J. Feldhaus, United States Penitentiary at Atlanta, Georgia, one year and one day.

Phil. Rothenbusch, Jail of Hamilton County, Ohio, six (6) months, and pay a fine of One Hundred and Fifty Dollars (150.00) and costs.

Arthur Tiedtke, Jail of Hamilton County, Ohio, Six (6) months, and pay a fine of One Hundred and Fifty Dollars ($150.00) and costs.

John Hahn, Jail of Hamilton County, Ohio, Six (6) months, and pay a fine of One Hundred and Fifty Dollars ($150.00) and costs.

Alfred Welker, jail of Hamilton County, Ohio, Three (3) months, and pay a fine of One Hundred Dollars ($100.00) and costs.

(e) Thereafter, a bill of exceptions was allowed by the court and proceedings in error were instituted in the Circuit Court of Appeals for the Sixth Circuit, which said court, on February 16, 1923, affirmed the conviction of the District Court by a divided vote, Hon. Maurice H. Donahue writing the prevailing opinion in which Hon. Loyal E. Knappen concurred, and Hon. A. C. Denison preparing a dissenting opinion.

(f) Your petitioners present herewith as a part of this petition, a certified copy of the transcript of the record, including all proceedings in said Circuit Court of Appeals.

(g) Your petitioners are advised and believe that said judgment of the United States Circuit Court of Appeals in said case is erroneous and that this Honorable Court should require said case to be certified to it for its determination as provided in Section 240, Judicial Code, for the following reasons.

1. The Circuit Court of Appeals of the Sixth Circuit, by its majority decision, has extended the crime of "conspiracy to defraud," as set forth in Section 37 of the Penal Code, to cover cases where persons combine to oppose the operation of a federal law which they consider unconstitutional.

2. The meaning given to the word "defraud" by the majority opinion of the court below goes beyond any reasonable and accepted meaning of the word as ordinarily used and as presumably contemplated by Congress when the statute was enacted.

3. The said majority opinion, in effect, enacts by judicial decree a new offense against the United States, which enactment in the instant case is *ex post facto*.

4. The said majority opinion on the point in question, is based not on the court's original reasoning but on the following definition of "conspiracy to defraud" given by the Supreme Court in the case of *Haas* v. *Henkel*, 216 U. S., 462, 479, as follows:

> "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government."

5. Counsel believe that the facts of this case and sim-

ilar cases do not fairly come within said definition, and that the Supreme Court never intended in its said decision to extend the meaning of the word "defraud" to cover facts such as are here involved.

6. If the decision of the court below stands as the law of the United States, it means that whenever two or more persons undertake to oppose the operation of a federal law or a federal regulation on legal or constitutional grounds, they become immediately subject to indictment for a conspiracy to defraud the United States. The statute may thus be used as an instrument to prevent the raising of constitutional objections to acts of Congress and may become, under circumstances easily conceivable, an instrument of tyranny.

7. It is the duty of the Supreme Court to make clear and unambiguous the meaning and scope of its aforesaid definition of "conspiracy to defraud," particularly in view of the divided opinion of the Circuit Court of Appeals of the Sixth Circuit.

8. In addition to the foregoing, counsel maintain that the courts below, in sustaining the indictment herein have disregarded the rule in *U. S.* v. *Britten,* 108 U. S., 199, 205, that in an indictment for conspiracy, the conspiratous agreement must be fully alleged and may not be helped out by reference to the overt acts portion of the indictment. In the instance case, the indictment charged only a conclusion as to the intention and purpose of the hand bills, etc. alleged to have been planned, without setting forth copies of the said hand bills or the substance thereof otherwise than in connection with the overt acts.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to

certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case, entitled Thomas Hammerschmidt and others v. United States of America, No. 3585, to the end that said case be reviewed and determined by this court as provided by Section 240 of the Judicial Code, and that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate, and in conformity with said provision of the Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof, may be reversed by this Honorable Court.

The petitioners aforesaid

By JOSEPH W. SHARTS,
ED. F. ALEXANDER,
Their Attorneys.

STATE OF OHIO, MONTGOMERY COUNTY, SS.

Joseph W. Sharts, being first duly sworn, says that he is one of the attorneys of record in the above entitled cause for the petitioners named in the foregoing petition for *writ of certiorari;* that he has read the same and knows that the contents thereof and the facts and matters stated therein are true, as he verily believes, and that this petition is still effective and meritorious in affiant's opinion, and is not intended for delay.

JOSEPH W. SHARTS.

Sworn to before me and subscribed in my presence this 2nd day of March, 1923.

[N. P. SEAL.] DANIEL P. FARRELL.
Notary Public, Montgomery County, Ohio.

SUPREME COURT OF THE UNITED STATES

THOMAS HAMMERSCHMIDT, LOTTA BURKE, CHARLES THIEMANN, FRANK REIS, FRED SCHNEIDER, WILLIAM GRUBER, ALEXANDER J. FELDHAUS, JOSEPH GEIER, PHIL ROTHENBUSCH, ARTHUR TIEDTKE, JOHN HAHN and *ALFRED WELKER,*

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

The first Draft Act was passed by Congress on May 18, 1917, and called for the registration of all male persons between the ages of twenty-one and thirty years on the fifth day of June, 1917. The Act was opposed, before its enactment, by about one-third of the representatives of the people in Congress, and by a very large part of the citizenship of the country, perhaps a majority, on the ground that it was contrary to all principles of American and Anglo Saxon liberty that any government should support itself by the forced military service of

its citizens. After the enactment of the law, it was opposed by two groups of persons— 1st, those who believed that religion, or a law higher than that of man, forbade the compulsion of any individual to take up arms in warfare; 2nd, by those who believed that the Constitution of the United States did not give Congress the power to enforce compulsory military service, particularly in a foreign war. The first group, however conscientious they were, in effect, took a position of wilfully disobeying the law. The main body of the Socialist party of the United States came within the second group. The court will perhaps remember that a number of cases to test the constitutionality of the Draft Act came to the Supreme Court and that the act was sustained by decision handed down January 8th, 1918.

In the city of Cincinnati, the Socialist Party held a municipal nominating convention meeting on Sunday, May 27th, 1917, at which it incidentally provided for the calling of a meeting of protest against the Conscription Act, and for the publication and issuance of a circular in that connection. As a review is asked in this court on the basis of the indictment only, it would be unprofitable at this time to go into the details of the specific action of this meeting of Sunday, May 27th. The evidence is set forth at length in the record. It suffices to say that an agent of the government was admittedly there and that the government, in putting on its case, made no reference to the convention meeting. In its proof, it went simply on the facts that eleven young men had been arrested while distributing or attempting to distribute the anti-conscription circular set up in the indictment and on the alleged but disputed fact that the defendants, Burke and Hammerschmidt, had ordered the printing

of the same. On these bald facts, the government asked the jury to convict all the defendants of a conspiracy to defraud the United States and the jury did so, though apparently, with some doubt in its mind, considering the fact that they remained out three hours and compromised on a verdict of guilty with recommendation of mercy.

ARGUMENT.

1, 2, 3.

Section 37 of the Penal Code, as readopted in 1909, punishes any conspiracy "to commit an offense against the United States or to defraud the United States." In the instant case, the acts are charged solely as a conspiracy to defraud the United States. As shown by the indictment (Rec., p. 5) and by the prevailing and dissenting opinions of the Circuit Court of Appeals, the alleged fraud in this case consisted of planning to publish circulars denouncing the conscription law as unconstitutional and calling upon citizens to maintain their constitutional rights by not obeying it.

Webster's International Dictionary defines the word "defraud" as follows: "to deprive of some right, interest, or property by a deceitful device; to cheat; to overreach." It must be admitted that the alleged fraud in this case could not be brought under any of the foregoing defnitions. Of course, counsel realize the difficulty, even in a dictionary, of setting forth any definition or succession of synonyms which will cover every conceivably possible shade of meaning. The terms "fraud" and "defraud" have given the courts considerable trouble,

but so far as counsel is aware, no act or set of acts not coming fairly under one or the other of the above definitions of Webster has ever been considered sufficient to justify a charge of fraud except in the instant case and in the similar cases of *U. S.* v. *Galleanni*, 245 Fed., 977, and *Firth* v. *U. S.*, 253 Fed., 36 (C.C.A., 4). Excluding the last named cases, the extreme judicial application of the term "fraud" or "defraud" was that made in the case of *Horman* v. *U. S.*, 116 Fed., 350 (C.C.A., 6), where it was held that a scheme to obtain money by blackmail, to-wit, by threatening to expose certain alleged criminal conduct of the victim, was a fraud, and that "a scheme or artifice to defraud is not limited in its meaning to such as are to be accomplished by means of deception or trickery." It will be noticed, however, that while there may not in this case have been deception or trickery in a literal sense (although counsel think the scheme could fairly be called a trick), the scheme was a scheme to cheat and that the elements of dishonesty, of taking advantage, and of "crooked" dealing were involved.

Prior to June 1, 1917, no ordinary person would have suspected that even the most violent open opposition to the government could be punished as a scheme to defraud the United States. Nobody would have dared to say that Congress contemplated the use of the term "conspiracy to defraud" to cover any such conduct. It is noteworthy in this connection that the indictment does not say simply that the defendants conspired to defraud the United States by performing certain acts; the government found it necessary to indicate that it was using the term "defraud" in an artificial meaning by adding the explanatory expression "by impairing, obstructing and defeating a lawful function of the government of the United States (taken bodily from *Haas* v. *Henkel*,

216 U. S., 462, 479), to-wit, the registration," etc. The inference is that if these explanatory words had been left out, nobody would have known what the government meant by charging the acts as a fraud.

It would thus appear that beginning with the year 1917, a new offense against the United States came into existence without any action on the part of Congress, to-wit, the offense of conspiracy to defraud the United States by denouncing an act of Congress. Correspondingly, the defendants, having been arrested before this judicial interpretation of Section 37 had been arrived at, were arrested for a crime which nobody knew existed until after they were charged with it.

4.

The indictment shows on its face that its peculiar application of the term "defraud" rests on an interpretation of a definition of conspiracy to defraud given in the case of *Haas* v. *Henkel*, 216 U. S., 462, 479, by adopting in its body the exact language of the court in that case. The judge of the District Court, in his opinion, adopted this interpretation without reasoning the point, merely saying (Rec., p. 36), "The objections to the indictment are overruled on authority of *Haas* v. *Henkel*, 216 U. S., 462; *U. S.* v. *Galleanni*, 245 Fed., 977; *Firth* v. *U. S.*, 253 Fed., 36 (C.C.A., 4.)" The latter two cases likewise refer to the language of *Haas* v. *Henkel* as binding without consideration of the circumstances. The majority opinion in the instant case similarly rests entirely on the definition in *Haas* v. *Henkel*, although it refers to certain other cases of fraud, to-wit, *Curley* v. *U. S.*, 130 Fed., 1 (C.C.A., 1); *Sugar* v. *U. S.*, 252 Fed., 79 (C.C.A., 6); *U. S.* v. *Sacks*, 257 U. S., 37; *U. S.* v. *Janowitz*, 257 U. S.,

42; *Hormon* v. *U. S.*, 116 Fed., 350; *Edwards* v. *U. S.*, 249 Fed., 686 (C.C.A., 6). But these cases in nowise bear out the extreme interpretation given to *Haas* v. *Henkel.* In every one of them, there existed facts which characterized the acts of defendants as fraudulent and dishonest, just as was the case in *Haas* v. *Henkel.*

Hormon v. *U. S.* has been commented on above. In *Curley* v. *U. S.*, the defendant impersonated an applicant who was supposed to be taking a civil service examination. *Sugar* v. *U. S.* was a case somewhat similar to the case at bar and the reasoning of that case would be inconsistent with the prevailing opinion of the Circuit Court here. The specific question before the court was whether an indictment which charged the defendants in one count with conspiring "to commit an offense against the United States or to defraud the United States" was objectionable as being duplicitous. The court held that the indictment did not set up any facts constituting a conspiracy to defraud and that therefore the use of the words "to defraud the United States" was mere surplusage. Counsel believe that the court in the Sugar case interpreted the term "defraud" in its natural and ordinary sense and by necessary inference, excluded the application of "conspiracy to defraud" from facts like those in the instant case. The cases of *U. S.* v. *Sacks* and *U. S.* v. *Janowitz* dealt with a scheme to have United States War Savings Certificates removed from the non-transferable certificates to which they were attached and affixed to other certificates by the defendants. The case of *Edwards* v. *U. S.* like the case of *Hormon* v. *U. S.* arose under Penal Code, 215 (using the mails to defraud), the fraud there consisting of a scheme to impose upon the public by falsely labeling certain

drug preparations so as to convey the impression that they were manufactured in Europe.

5.

Taking up the definition of "conspiracy to defraud" as given by the Supreme Court in *Haas* v. *Henkel,* it is clear that so far as the facts of that case were involved, "impairing, obstructing or defeating the lawful function of any department of Government" referred not to external opposition to the operation of a law (which Congress could guard against by legislation fitting the case without ambiguity), but to interfering with the workings of the functions of governmental departments by bribing or corrupting employees or otherwise causing these departments to act in a manner contrary to law or to the requirements of the government. Such an interpretation of the court's definition is not only in harmony with the definition as applied to the facts of the case of *Haas* v. *Henkel,* but is in harmony with the ordinary established and anambiguous usage of the term "defraud."

So far as the idea of fraud is concerned, there can be no distinction between fraud against the United States and fraud against a private person or corporation, if the facts are the same. If, for example, a private corporation had issued orders that all its employees should, on a fixed day, fill out certain registration blanks setting forth various facts concerning themselves and their families, and certain of the employees issued a handbill calling on the employees to refuse to register and to stand on their rights, could it be fairly said that this was a conspiracy to defraud the corporation by impairing, etc., one of its functions? Obviously not, for the reason that

there would be involved no artifice, no scheme, no cheating, no overreaching, and no dishonest dealing. On the other hand, if a group of employees were, by bribery or threats, to persuade the officials in charge not to require answers from some of them, or to accept false answers, this would be impairing and obstructing a function of the corporation so as to constitute fraud on the corporation in the sense contemplated by the Supreme Court in its definition in *Haas* v. *Henkel.*

Counsel further believes that even if the language of the definition in *Haas* v. *Henkel,* literally interpreted, could be made to apply to acts such as those alleged in the instant case, the Supreme Court never intended that it should be so applied.

6.

It does not require any great imagination to realize the danger to constitutional government in the interpretation of the conspiracy statute as given by the majority opinion below. If this interpretation had been effective along about the year 1894, when the Cleveland income tax law was passed by Congress, the government could immediately have arrested the persons who arranged to resist the collection, by charging them with a conspiracy to defraud the United States by "impairing, etc., a lawful function of the government," to-wit, the collection of an income tax. Of course, after the income tax was found unconstitutional, the indictment would necessarily have failed, but in the meantime, the weapon might have been very effective. The same might be said of the North Carolina manufacturers who resisted the operation of the Child Labor Statutes. In 1916, a number of

railroad managers decided to test the Adamson act and for some seven or eight months, until the Supreme Court acted, failed to follow its provision. If the interpretation claimed for the definition in *Haas* v. *Henkel* is correct, they were guilty of a conspiracy to defraud the United States by impairing, etc., a lawful function of the United States, to-wit, the regulation of railroads engaged in interstate commerce. Further, in the event that the United States were to operate the railroads or any other public utility, objection to any set of rates or regulations imposed by some government bureau could be treated as a conspiracy to defraud by impairing, etc., the lawful function of a department of the government. Conspiracy to defraud could be made the great catch-all for all troublesome persons whose minds did not run with those of the powers temporarily in control of the government.

If it should be said that it would be intolerable that persons should be able to interfere with the operation of a law during the period in which its constitutionality was being considered, the answer would be that ample penalties are usually provided, where necessary, to discourage any foolish or insincere raising of constitutional or legal questions. It might further be said that Congress is not helpless. It can and generally does enact laws to meet situations that may arise. It is not the duty of courts to give unusual and far-fetched meanings to general statutes in order to cover a particular situation which Congress either never contemplated or perhaps ignored.

7.

In general, it might fairly be said that the majority opinion of the court below held that the facts alleged in

this case, *whether fraudulent or not,* constituted a conspiracy to defraud because of the definition given by the Supreme Court in *Haas* v. *Henkel.* On the other hand, the dissenting opinion held that the facts here did not constitute a conspiracy to defraud, *because they were not fraudulent,* and that the Supreme Court neither by its language in *Haas* v. *Henkel,* nor otherwise, intended that conspiracy to defraud should cover acts not fraudulent.

In view of the foregoing, it would seem to counsel that the Supreme Court which made the definition in *Haas* v. *Henkel* should clear up the interpretation of it.

8.

The main argument of this petition is, of course, as to the definition in *Haas* v. *Henkel* above referred to. It goes entirely to the indictment, without reference to the merits of the facts of the case which were tried out in the courts below. However, it appears to counsel that while the court is considering the indictment, it might consider the question whether, in a charge of conspiracy, it is sufficient to allege that the conspirators sought to accomplish their purpose by literature "composed, printed, intended and designed for the purpose," etc., without apprising the defendants by copy of such literature or by a statement of its substance, of the particular literature charged as offensive. In the opinion of counsel, it appears that this indictment charged nothing more than a conclusion. It would seem axiomatic that the government in proving its case must either offer in evidence the literature or show what the substance of it was. It could certainly not offer testimony simply to the effect

that it was designed, etc., to accomplish a certain purpose. Therefore, if the proof required evidence as to the literature rather than a conclusion as to its purpose and effect, it would seem that the indictment itself should either set forth copies of the alleged offending literature or state its substance so that the defendants might be informed and so that the court before proceeding to trial might determine whether the alleged literature really was of the character claimed in the conclusion of the indictment.

As counsel understand the case of *U. S.* v. *Britton*, 108 U. S., 199, 205, this indictment did not properly charge a conspiracy. The defendants, it will be particularly noted, are not charged with conspiring to publish the circular set up in the overt acts portion of the indictment, and the court will not help out the charge of conspiracy by inferences from the overt acts charged.

CONCLUSION.

For the reasons herein set forth, counsel respectfully submit that this case ought to be reviewed by the Supreme Court.

Ed. F. Alexander,
Joseph W. Sharts,
Attorneys for Petitioners.